United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 22, 2010

TO : Joseph P. Norelli, Regional Director

Region 20

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Seton Medical Center

Case 20-CA-34687

This case, submitted to Advice in light of the current dispute between SEIU-UHW-W and the National Union of Healthcare Workers (NUHW), involves allegations by Charging Party NUHW that Seton Medical Center ("the Employer") violated Section 8(a)(1) and (2) by: (1) enforcing a nosolicitation/distribution rule against NUHW and denying it access to its medical facilities while continuing to grant such access incumbent union (SEIU) in accordance with its collective-bargaining agreement; (2) granting SEIU increased or greater access to its facilities after NUHW began its organizing campaign; and (3) discriminatorily allowed non-employee vendors to solicit in the cafeteria while prohibiting NUHW from doing so. We conclude that the charge allegations should be dismissed, absent withdrawal, since the Employer's conduct regarding NUHW's attempts at solicitation and access did not violate Section 8(a)(1), and there is insufficient evidence that the Employer knowingly favored and assisted SEIU in its organizational activity vis-à-vis NUHW in violation of Section 8(a)(2) and (1).

FACTS

SEIU represents about 850 employees in the Employer's separate hospital and nursing home facilities, and they were covered by a contract that expired in April 2008. The parties are still negotiating a successor agreement, and NUHW filed an election petition in February 2009.

The hospital has a public cafeteria on the second floor and a non-public cafeteria on the first floor, while the nursing home has only a non-public cafeteria. By virtue of the collective-bargaining agreement, SEIU's "duly authorized Field Representatives shall be allowed access to visit the facility at all times to ensure compliance with this Agreement and to conduct Union business."

Since 2004, the Employer has maintained a written policy prohibiting non-employee solicitation and

distribution, and permitting employees to solicit and distribute literature in nonwork areas, including cafeterias. On September 28, 2009, Employer official White issued a letter to all employees, stating in relevant part:

Recently, several associates have reported being approached, both in the cafeterias and in their work areas, by individuals who may be associated with NUHW or some other organization that does not legally represent any of our associates.

Just to clarify, the SEIU-UHW is the only union that represents our SEIU associates. Under our contract with SEIU-UHW, duly authorized representatives of SEIU-UHW have the right to be in the hospital and conduct union business within the guidelines provided by the contract. Neither NUHW nor any other organization has such rights with respect to our SEIU-represented associates.

In order to avoid any confusion about what individuals are authorized to be present in the hospital to conduct union business, we have been authorized by SEIU-UHW to provide you with the names of duly authorized... representatives:.... Other than [those listed above], no other individuals have the right to be in non-public areas of the hospital.

(Emphasis in original.)

At the nursing home, the Employer has called or threatened to call the police each time two NUHW representatives attempted to enter the facility and specifically notes that the cafeteria is not open to the general public for any purpose. The Employer has permitted non-union entities affiliated with Employer-provided fringe benefits (e.g. financial services and insurance) to set up tables in the cafeteria periodically and speak with interested employees about those benefits.

At the hospital, the Employer has permitted NUHW representatives to visit the public cafeteria. On some occasions, security guards have told representatives that they must leave after buying and finishing their meals, and sometimes have allowed the representatives to remain in the cafeteria when their presence is inconsistent with normal public use, i.e. buying something to consume. The Employer has also permitted organizations associated with its health and financial services benefit programs to engage in solicitation and distribution in the cafeteria without the restrictions placed on NUHW and other non-union entities.

SEIU has had a long-standing practice of visiting employees in the non-public cafeteria after the cafeteria closed and after the hospital was closed to visitors and the public. Representatives of the benefit programs discussed above have also set up tables there after hours. On the one occasion when an NUHW representative attempted to enter this cafeteria after hours, the Employer instructed her to leave and threatened to call the police if she did not.

Prior to and after the creation of NUHW, SEIU had occasionally used the back of the cafeteria, along with conference rooms, to conduct union business related to representation and bargaining. NUHW asserts generally that in 2009, SEIU began using these meetings for campaign purposes, and on one occasion informed the Employer of this belief. There is no evidence as to the frequency or subject matter of these meetings. 1

Prior to SEIU's imposition of the trusteeship, it had appointed one or two representatives to conduct Union business at the Employer's facilities, along with numerous employee stewards. It had neither requested nor been denied access by additional outside representatives. Since the trusteeship, the Employer has been aware that SEIU has deployed as many as nine non-employee representatives to visit the facilities, and virtually all of the former stewards now support NUHW.

ACTION

We conclude that the charge should be dismissed, absent withdrawal, since the Employer's conduct regarding NUHW's attempts at solicitation and access did not violate Section 8(a)(1), and there is insufficient evidence of either discrimination or that the Employer knowingly favored and assisted SEIU in its organizational activity vis-à-vis NUHW in violation of Section 8(a)(2) and (3).

As to solicitation, freedom of employees to effectively communicate with each other regarding unionization is deemed essential to their right to self-

¹ NUHW contends that SEIU representatives have occasionally harassed employees and have entered patient care areas. The Employer states that it has dealt with any such SEIU appearance by ejecting the representative and promptly admonished representatives whenever employees have complained of harassment.

organize and to bargain collectively.² Hospital employees have the right to distribute literature and solicit coworkers in break rooms on their own time in non-patient care areas.³ The Section 7 right of employees to engage in union solicitation in their place of business is limited only by an employer's legitimate interest in maintaining production and workplace discipline.⁴

Non-employee union organizers have no statutory right of access to an employer's property, so long as employers do not discriminate against unions by allowing other nonemployee distribution.⁵ An incumbent collective-bargaining representative's right to access employer property may arise out of a collective-bargaining agreement or past practice.⁶

The Board has long held that employers generally must remain strictly neutral in representational campaigns among two or more unions, but has recognized that an incumbent union in such a situation may have certain inherent access advantages over a rival union where its contract with the employer or past practice provides rights to access the employer's property and employees. In those circumstances, the employer must exercise care not to knowingly allow the incumbent to abuse its contractual rights in order to obtain an unfair campaigning advantage over the rival union.⁷

As discussed above, the Employer generally permitted nonemployee NUHW supporters access to its hospital public cafeteria so long as they, like other non-employees, acted

² See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 795, 801-03 (1945).

³ See <u>Beth Israel Hospital v. NLRB</u>, 437 U.S. 483, 495, 507 (1978).

⁴ Republic Aviation, above, 324 U.S. at 803, n.10.

⁵ NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

⁶ See <u>Special Machine & Engineering</u>, 247 NLRB 884, 886-87 (1980).

⁷ <u>Laub Baking Co.</u>, 131 NLRB 869, 871 (1961) (no violation when rival union requested access and employer, after learning incumbent began campaigning during its contract administration visits, took reasonable efforts to enforce its no-electioneering policy against incumbent).

consistently with the cafeteria's "normal public use." There is also evidence that Employer security guards did not always restrict NUHW cafeteria solicitation when its supporters were not eating there. The Employer does consistently prohibit non-employee NUHW supporters from being in non-public areas of its facilities while permitting SEIU non-employee officials to access such areas consistent with its contractual obligation regarding "duly authorized representatives Field Representatives" to administer the contract and conduct related union business. The Employer's September 28 letter to employees did nothing more than reiterate SEIU's rights in this regard vis-à-vis NUHW or any other organizations; it cannot reasonably be read as prohibiting employee solicitation or distribution on behalf of NUHW in violation of Section 8(a)(1).

Whenever the Employer became aware that SEIU may have solicited in work areas or where employees were working, it instructed SEIU to cease such activities and took steps to prevent similar future occurrences. Likewise, only after NUHW officials attempted to solicit in non-public areas did the Employer begin to monitor their activities to the extent necessary in determining whether prior transgressions will be repeated. There is also no evidence that subsequent to the trusteeship, SEIU deviated from past practice by increasing its use of conference or VIP rooms and cordoning off the back of the cafeteria to conduct anything other than representational union business, or that the Employer knowingly acquiesced in any SEIU campaign activity in its facilities. See Laub Baking, above. Moreover, the post-trusteeship increase in the number of non-employee Field Representatives allowed access to the facilities for contract administration purposes was not unlawful Employer assistance to SEIU. The contract provision allowing access to such "duly authorized" individuals does not purport to limit the number of representatives.8

Finally, the Employer did not violate Section 8(a)(3) by allowing entities affiliated with Employer-provided fringe benefits, but not NUHW, periodic access to speak with interested employees about those benefits in the

⁸ In this regard, we note that most of the contract administration was formerly conducted by numerous employee stewards who, after the imposition of the trusteeship, resigned and began supporting NUHW. Given the absence of experienced stewards, it was not unreasonable for SEIU to carry out these functions using experienced Field Representatives.

cafeteria. Disparate treatment does not constitute unlawful discrimination where, as here, it involves "work-related" solicitation limited to activities regarding an employer's regular benefit package. 9

Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.

9 See Lucile Salter Packard Children's Hospital v. NLRB, 97
F.3d 583, 590 (D.C. Cir. 1996).